Supreme Court, U.S.
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NO. 91-1834

In the Supreme Court of the United States

October Term, 1991

BUNGE EDIBLE OIL CORPORATION

Petitioner

VERSUS

CANADIAN PACIFIC (BERMUDA) LTD.
AND A.S. DAMPSKIBSSELSKABET TORM

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

Brief for Respondent
Canadian Pacific (Bermuda) Ltd.
In Opposition

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QUESTION PRESENTED

Whether this Court should exercise its discretionary jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit, affirming the District Court's decision that a carrier's material deviation in the carriage of goods by sea does not foreclose the carrier's defensive assertion of the one-year time limitation period provided by §3(6) of the Carriage of Goods by Sea Act, 46 U.S.C. §1301, et seq.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Report of Opinions Below	1
Statement of Jurisdiction	1
Statement of the Case	1
Summary of Argument	4
Argument	5
Conclusion	19

TABLE OF AUTHORITIES

Page

STATUTES

Carriage of Goods by Sea Act, 46 U.S.C. 1301, et seq. 2

46 U.S.C. §1303(6) . . . . . passim

46 U.S.C. §1312 . . . . . 5, 8

[British] Carriage of Goods by Sea Act 1971 (Commencement) Order 1977 (S.I. 1977, No. 981) 12, 13, 14

CASES

Allstate Insurance Company v. International Shipping Corp., 1982 AMC 1763 (S.D. Fla. 1981) 11

Birdsall, Inc. v. Tramore Trading Co., Inc., 771 F. Supp. 1193 (S.D. Fla. 1991) 5

Cerro Sales Corporation v. Atlantic Marine Enterprises, Inc., 403 F. Supp. 562 (S.D.N.Y. 1975) 11

The Chester Valley, 110 F.2d 592, 594 (5th Cir. 1940) 15

Page

Corat International, Inc. v. Saudi National Lines, 439 So.2d 1035 (Fla. App. 3 Dist. 1983) 5

The Delaware, 81 U.S. (14 Wall.) 579 (1872) 8

General Electric Company International v. S.S. NANCY LYKES, 706 F.2d 80 (2nd Cir. 1983) 15

Insurance Company of North America v. The S/S EXMINSTER, 127 F. Supp. 541 (S.D.N.Y. 1954) 11

Insurance Company of North America v. S/S OCEANIS, 690 F. Supp. 1365 (S.D.N.Y. 1988) 5, 17, 18

Italia Di Navigazione v. M/V HERMES I, 1984 AMC 485 (S.D.N.Y. 1983), aff'd, 724 F.2d 21 (2nd Cir. 1983) 11

Jones v. The Flying Clipper, 116 F. Supp. 386 (S.D.N.Y. 1953) 15, 16, 17, 18

Kenya Railways v. Antares Co. Pte. Ltd. (The "Antares"), (Nos. 1 and 2) Q.B. (Com. Ct.) [1986] 2 Lloyd's Rep. 626; [1986] 2 Lloyd's Rep. 633; C.A. [1987] 1 Lloyd's Rep. 424 . . . . . 12, 14

Minex v. International Trading Company of Virginia, 303 F. Supp. 205 (E.D. Va. 1969) 11

Page

Northwestern National Insurance Co. v. Miles A. Galin, 1987 U.S. Dist. Lexis 10927, N. 85 Cir. 1832 (S.D.N.Y. 1987) 11

P.T. Asuransi Parolamas v. M/V ROBERT E. LEE, 1989 AMC 2885 (D.N.J. 1989) 5, 6, 18

Potter v. North German Lloyd, 1943 AMC 738 (N.D. Ca. 1943) 5

Rohm & Haas v. American President Lines, Ltd., 1989 AMC 420 (S.D.N.Y. 1988) 5, 18

Searoad Shipping Company v. E.I. duPont de Nemours & Company, 361 F.2d 833 (5th Cir. 1966) 15

Singer Hosiery Mills v. Cunard White Star, 1951 AMC 988 (Mun. Ct. N.Y. 1951) 5, 7

Spartus Corporation v. S/S YAFO, 590 F.2d 1310 (5th Cir. 1979) 15

Stagline Ltd. v. Foscolo, Mango & Co., (The IXIA), [1932] A.C. 328 (1931) 12

Styling Plastics Co., Ltd. v. Neptune Orient Lines, Ltd., 666 F. Supp. 1406 (N.D. Ca. 1987) 5, 18

Swisse Atlantique Societe d'Armement Maritime S.A. v. Rotterdamsche Kolen Centrale, [1966] 1 Lloyd's Rep. 529; [1967] 1 A.C. 361 13

Page

Switzerland General Ins. Co. v. Navigazione Libera Triestina, S.A., 91 F.2d 960, 963 (2nd Cir. 1944) 18

United States v. Wessel Duval & Co., Inc., 115 F. Supp. 678 (S.D.N.Y. 1953) 8, 9, 10, 11

REPORT OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 949 F.2d 786 (5th Cir. 1992). The opinion of the United States District Court for the Eastern District of Louisiana is reported at 756 F. Supp. 261 (E.D. La. 1991).[1]

STATEMENT OF JURISDICTION

The jurisdiction of this Court arises under 28 U.S.C. §1254.

STATEMENT OF THE CASE

The trial court found, and the United States Court of Appeals for the Fifth Circuit agreed, that if Respondent, Canadian Pacific (Bermuda), Ltd. ("Canadian Pacific (Bermuda)") had committed an unreasonable deviation,[2] this deviation did not foreclose Canadian Pacific (Bermuda)'s defensive assertion of the one-year time limitation period in §3(6) of the Carriage of Goods by Sea

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[1] The District Court's opinion was incorrectly cited in Petitioner's brief as 256 F. Supp. 261 (E.D. La. 1991).

[2] For the purposes of its decision, the District Court proceeded under the assumption that the transshipment of the cargo of RBD palm oil aboard the M/V FORT STEELE at Rotterdam constituted an unreasonable deviation. For the purposes of this brief only and without waiving any defenses as to whether a deviation in fact occurred, Canadian Pacific (Bermuda) will assume that such transshipment constituted an unreasonable deviation.

Act, 46 U.S.C. 1301, et seq. ("COGSA"), and therefore, the claims of Petitioner, Bunge Edible Oil Corporation ("Bunge") against the M/V TORM RASK, the M/V FORT STEELE and Canadian Pacific (Bermuda) as COGSA carriers are time barred.

This case arises out of the claim of Petitioner, Bunge, for alleged damage to a cargo of refined, bleached and deodorized ("RBD") palm oil. This cargo was originally delivered to the TORM RASK on or about July 11, 1988, at Pasir Gudang, Malaysia, for carriage to the Port of New Orleans, Louisiana, pursuant to Bill of Lading PG/NYNOLA-5. The TORM RASK was owned by A/S Dampskibsselskabet Torm ("Torm") and was under time charter to Respondent, Canadian Pacific (Bermuda). Bill of Lading PG/NYNOLA-5 was issued by Canadian Pacific (Bermuda).[3] Thereafter, said cargo was transshipped at the Port of Rotterdam, Netherlands, aboard the FORT STEELE, owned by Canadian Pacific (Bermuda), for carriage to New Orleans, Louisiana. The cargo ultimately was discharged to Barge MMI-307 at Reserve, Louisiana, and delivered to Bunge on or about the week of October 1, 1988.

On December 29, 1989, more than one year following the discharge of the cargo at New Orleans, Bunge filed a complaint

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[3] Uncontradicted testimony, which was found by the District Court and the Fifth Circuit to be accurate, indicated that although the bill of lading was a form tanker bill of lading previously created by Canadian Pacific Steamships London (an entity which ceased active trading in 1983), it was issued in this case by Canadian Pacific (Bermuda).

in the United States District Court for the Eastern District of Louisiana alleging that Canadian Pacific Steamships London, Canadian Pacific Bulkships Service, Ltd., Canadian Pacific Ships ("Canadian Pacific entities"), and/or Torm in personam[4] were liable in their capacity as carrier for the damage allegedly sustained to the cargo of RBD palm oil at some point during transit. The Canadian Pacific entities answered the complaint alleging that the claims asserted by Bunge were time barred under §3(6) of COGSA. Thereafter, on June 14, 1990, Bunge amended its complaint to add Canadian Pacific (Bermuda) as a party defendant, alleging that it too was liable to Bunge in its capacity as carrier. Similarly, Canadian Pacific (Bermuda) answered Bunge's complaint alleging that its claims were time barred under §3(6) of COGSA.

On December 14, 1990, the Canadian Pacific entities and Canadian Pacific (Bermuda) filed a motion for summary judgment seeking dismissal of Bunge's claims on the basis that its claims for cargo damage were time barred pursuant to §3(6) of COGSA. Without oral argument, the District Court issued an order on January 15, 1991, granting the motion for summary judgment on the time-bar issue in favor of the TORM RASK and the FORT STEELE, in rem and Canadian Pacific (Bermuda), in personam, as the COGSA carriers. Specifically, the District Court held that although there may have been a material deviation in the shipment of Bunge's cargo, that deviation would

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[4] Although Bunge also sued the TORM RASK and the FORT STEELE, in rem, service was never made and the in rem claims were never pursued.

not foreclose the carriers' defensive assertion of the one-year time limitation period provided by §3(6) of COGSA. This decision was affirmed by the United States Court of Appeals for the Fifth Circuit January 2, 1992.

SUMMARY OF ARGUMENT

The District Court, as affirmed by the Fifth Circuit, was correct in granting summary judgment in favor of the M/V TORM RASK, the M/V FORT STEELE and Canadian Pacific (Bermuda) Ltd. based on §3(6) of the Carriage of Goods by Sea Act, 46 U.S.C. §1303(6), dismissing the claims asserted against them by Bunge Edible Oil Corporation under Bill of Lading PG/NYNOLA-5 as time barred.

The District Court, as affirmed by the Fifth Circuit, also was correct in holding that any deviation committed by the TORM RASK, the FORT STEELE and Canadian Pacific (Bermuda) as COGSA carriers did not foreclose their defensive assertion of the one-year time limitation provision of §3(6) of COGSA. Although this holding, one of first impression in the Fifth Circuit, is in conflict with a line of cases which originated in the Southern District of New York, both the District Court and the Fifth Circuit concluded that that particular line of cases was based on a misapplication and an erroneous extension of precedent which should not be perpetuated in the Fifth Circuit.

ARGUMENT

A DEVIATION DOES NOT DEPRIVE AN OCEAN CARRIER OF THE PROTECTION OF THE COGSA ONE-YEAR STATUTE OF LIMITATIONS.

Because Bunge's claims arise from the carriage of a cargo of RBD palm oil from a foreign port (Pasir Gudang) to a port of the United States (New Orleans), the terms and conditions of the Carriage of Goods By Sea Act apply to the resolution of those claims as a matter of law. 46 U.S.C. §1312.

This issue was one of first impression in the Fifth Circuit. Prior to rendering their decisions, the District Court and the Fifth Circuit each made an insightful review of the existing case law of other circuits and correctly held that a carrier's material deviation in the carriage of goods by sea does not preclude the carrier's defensive assertion of the one-year time limitation period in §3(6) of COGSA. Birdsall, Inc. v. Tramore Trading Co., Inc., 771 F. Supp. 1193 (S.D. Fla. 1991); P.T. Asuransi Parolamas v. M/V ROBERT E. LEE, 1989 AMC 2885 (D.N.J. 1989); Rohm & Haas v. American President Lines, Ltd., 1989 AMC 420 (S.D.N.Y. 1988); Insurance Company of North America v. S/S OCEANIS, 690 F. Supp. 1365 (S.D.N.Y. 1988); Styling Plastics Co., Ltd. v. Neptune Orient Lines, Ltd., 666 F. Supp. 1406 (N.D. Ca. 1987); Corat International, Inc. v. Saudi National Lines, 439 So.2d 1035 (Fla. App. 3 Dist. 1983); Singer Hosiery Mills v. Cunard White Star, 1951 AMC 988 (Mun. Ct. N.Y. 1951); Potter v. North German Lloyd, 1943 AMC 738 (N.D. Ca. 1943). Therefore, Bunge's claims against

the TORM RASK, the FORT STEELE and Canadian Pacific (Bermuda) are time barred.

In ROBERT E. LEE, the court clearly explains the rationale behind its holding:

> [Plaintiff] does not contend that it did not know of, or could not discover, the water damage to the [cargo] on the date of delivery - the triggering event of the COGSA limitations period. Thus, the deviation, if one occurred, did not have any affect on its ability to commence this action within the one-year period....

ROBERT E. LEE, 1989 AMC at 2892.

Similarly, the act of transshipment of Bunge's cargo of RBD palm oil at Rotterdam cannot be said to have affected Bunge's ability to commence suit within the requisite one-year period, given its knowledge of the potential claim and its correspondence with certain Canadian Pacific entities as early as five days following discharge of the cargo.

Section 3(6) of COGSA specifically provides:

> In any event, the carrier and the ship shall be discharged from all liability in respect of loss or damage, unless suit is brought within one year

> after delivery of the goods or the date when the goods should have been delivered.

46 U.S.C. §1303(6).

Commenting on the language of the statute, the court in Singer Hosiery explained its holding as follows:

> This provision of the Act is all inclusive; it is of the substance of the rights between the parties. Granting that a breach has occurred and even assuming that the provisions of the bill of lading have been nullified and the carrier has become an insurer, under our Federal law which governs this action, the shipper unless he has in some manner been relieved from the one-year limitation, is bound to begin the action for a breach within one year after delivery of the goods or when the goods should have been delivered.

Singer Hosiery, 1951 AMC at 990.

BUNGE'S RELIANCE UPON PRE-COGSA LAW OF DEVIATION IS MISPLACED.

Bunge relies heavily upon the pre-COGSA law of deviation; however, its application to the present case is misplaced. Prior to the enactment of COGSA in 1936, the law of carriage of

goods by sea, including the effect of a material deviation, was governed by the terms and conditions of the contract of carriage and interpreted under contract law. Thus, a carrier's material deviation in the carriage of goods by sea was considered a breach of the contract of carriage, thereby vitiating the entire contract including the defenses and limitations. The Delaware, 81 U.S. (14 Wall.) 579 (1872). This breach of contract interpretation of the effect of a carrier's material deviation has not changed following the enactment of COGSA, it continues to apply when COGSA does not apply by operation of law but when COGSA is incorporated into the contract of carriage by the parties.[5] United States v. Wessel Duval & Co., Inc., 115 F. Supp. 678 (S.D.N.Y. 1953).

In Wessel Duval, a time charterer, the United States, bareboat chartered the vessel to Wessel Duval and the parties incorporated the terms and conditions of COGSA into the bareboat charter. Thereafter, the United States brought suit against Wessel Duval for the loss of its cargo and Wessel Duval attempted to dismiss the claims as time barred under §3(6) of COGSA. The United States responded alleging that "the conduct of ... [Wessel Duval] ... was such as to deprive it of the benefits of the one-year limitation in [COGSA]." Id. at 683. The Court resolved this issue in favor of the United States based on Wessel

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[5] Section 1312 of COGSA specifically permits parties entering into a contract of carriage, which otherwise would not be subject to its terms and conditions, to draft the contract of carriage expressly stating that it shall be subject to the terms and conditions of the statute. 46 U.S.C. §1312.

Duval's breach of contract and not based on an analysis of the language of §3(6) of COGSA.

In contrast, when the terms and conditions of COGSA apply to the carriage of goods by sea as a matter of law rather than as a negotiated provision within a contract of carriage, it is the language of the statue that governs the relationship between the carrier and the shipper and not the law of contracts. The court in Wessel Duval recognized the important difference between the application of COGSA through a contractual agreement and the application of COGSA by statue in stating that:

> [t]hose words 'in any event' may well result in preserving this statutory limitation even though the ship has been guilty of a deviation. Here, however, the Act has effect only as an agreement of the parties; if the agreement that unless suit is brought within one year, the ship shall be discharged goes by the board when the ship is guilty of a deviation, the agreement that unless suit is so brought the ship shall be discharged 'in any event' will go by the board too.

Id. at 684.

Thus, the post-COGSA contract law of deviation has not changed, it merely recognizes that with the enactment of a statute, when that statute applies by operation of law, rather than through its incorporation by the parties into a contract of

carriage, the plain language of the statute applies to the resolution of a dispute.

The plain language of COGSA under scrutiny here clearly provides that

> [i]n any event the carrier and the ship shall be discharged from all liability and respective loss or damage unless suit is brought within one year after discharge of the goods....

46 U.S.C. §1303(6). (Emphasis added.)

The words "in any event" in the time limitation provision preserve the statutory limitation even though the ship has been guilty of a deviation. The District Court and the Fifth Circuit were correct in applying the plain language of the statute dismissing Bunge's claims as time barred.

As the District Court and the Fifth Circuit correctly recognized, the holding in Wessel Duval has been erroneously extended by other courts (and Bunge) as precedent in cases such as this in which COGSA applies to the carriage of goods by

operation of law.[6] Thus, it is the improper extension and misapplication of the holdings of Wessel Duval, Minex, Cerro and S/S EXMINSTER by the courts in Allstate Insurance Company v. International Shipping Corp., 1982 AMC 1763 (S.D. Fla. 1981); Italia Di Navigazione v. M/V HERMES I, 1984 AMC 485 (S.D.N.Y. 1983), aff'd, 724 F.2d 21 (2nd Cir. 1983); Northwestern National Insurance Co. v. Miles A. Galin, 1987 U.S. Dist. Lexis 10927, N. 85 Cir. 1832 (S.D.N.Y. 1987) which the Fifth Circuit insightfully refused to perpetuate. The courts in International Shipping, M/V HERMES I and Miles A. Galin each relied upon cases decided under a breach of contract analysis, erroneously extending that precedent to their own facts in which COGSA applied as a matter of law.

This Court should not grant a writ of certiorari in this case. The District Court and the Fifth Circuit were correct in refusing

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[6] Beyond its misplaced reliance on Wessel Duval, Bunge further relies on three subsequent cases following the rationale of Wessel Duval. Insurance Company of North America v. The S/S EXMINSTER, 127 F. Supp. 541 (S.D.N.Y. 1954); Minex v. International Trading Company of Virginia, 303 F. Supp. 205 (E.D. Va. 1969); Cerro Sales Corporation v. Atlantic Marine Enterprises, Inc., 403 F. Supp. 562 (S.D.N.Y. 1975). These cases also hold that a carrier's deviation forecloses its ability to defensively assert COGSA's one-year time limitation provision when the terms and conditions of COGSA are not mandated by statute but apply by way of incorporation into the bill of lading, charterparty or contract of carriage. Accordingly, Bunge's reliance on these breach of contract cases is equally misplaced.

to follow those courts which relied upon prior jurisprudence decided under a breach of contract theory as precedent for situations in which COGSA applies as a matter of law. The District Court and the Fifth Circuit also were correct in following those courts which apply the plain language of the statute, preserving a deviating carrier's defensive assertion of the one-year time limitation in §3(6) of COGSA.

A portion of Bunge's lengthy historical analysis of pre-COGSA law, which is inapplicable to the present issue, includes an inaccurate discussion of British law. In fact, the leading British case involving the [British] Carriage of Goods by Sea Act 1971 (Commencement) Order 1977 (S.I. 1977, No. 981) and the effect of a deviation upon the one-year time limitation[7] is not Stagline Ltd. v. Foscolo, Mango & Co., (The IXIA), [1932] A.C. 328 (1931) as Bunge suggests. In 1986, the court in Kenya Railways v. Antares Co. Pte. Ltd. (The "Antares"), (Nos. 1 and 2) Q.B. (Com. Ct.) [1986] 2 Lloyd's Rep. 626; [1986] 2 Lloyd's Rep. 633; C.A. [1987] 1 Lloyd's Rep. 424,

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[7] The one-year time limitation in the [British] Carriage of Goods by Sea Act is found in art. III, r. 6 of the Hague Visby Rules and provides:

> ... the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.

held that the carrier's "fundamental breach" in stowing goods on deck did not preclude the carrier from relying on the one-year time limitation of art. III, r. 6 of the Hague Visby Rules (Carriage of Goods by Sea Act). In affirming the lower court, Lord Justice Lloyd explained:

> [Appellee] relies on a passage in the current edition of Scrutton [on Charterparties] at p. 167:
>
> > The effect of deck stowage not so authorized will be to set aside the exceptions of the charter or bill of lading, and to render the shipowner liable under his contract of carriage for damage happening to such goods.
>
> That passage has appeared in identical terms in successive editions of Scrutton, going back, we are told, to the last edition for which Lord Justice Scrutton was himself responsible. But with great respect to the editors of the current edition it no longer represents the law. The doctrine of fundamental breach upon which [the appellee] relies, that is to say the doctrine that a breach of contract may be so fundamental as to displace the exceptions clauses altogether, no longer exists. The death knell sounded in Swisse Atlantique Societe d'Armement Maritime

> S.A. v. Rotterdamsche Kolen Centrale, [1966] 1 Lloyd's Rep. 529; [1967] 1 A.C. 361.

The ANTARES, C.A. [1987] 1 Lloyd's Rep. at 429.

The analysis of the lower court in The ANTARES was similar to that of the Fifth Circuit in this case, they began by noting that

> [t]he starting point must be that the Hague Visby Rules are compulsorily applicable....

and concluded with an examination of the language of the statute. The ANTARES, Q.B. (Com. Ct.) [1986] 2 Lloyd's Rep. at 636. Finally, the court of appeals stated:

> The sole question therefore is whether, on its true construction, art. III, r. 6 applies. It is clear that it does. It provides that the carrier shall in any event be discharged from all liability whatsoever unless suit is brought within one year.

The ANTARES, C.A. [1987] 1 Lloyd's Rep. at 430.

Thus, British law does not support Bunge's view, it provides that when the [British] Carriage of Goods by Sea Act applies as a matter of law, a carrier's deviation does not preclude the carrier's defensive assertion of the one-year time limitation period.

BUNGE'S RELIANCE UPON AN ANALOGY TO THE $500 PER PACKAGE LIMITATION IS MISPLACED.

Bunge argues that further support for its position can be found by analogy to jurisprudence holding that a carrier's unjustifiable deviation deprives it of the benefit of the $500 per package limitation of liability contained in §3(4) of COGSA. In making this inappropriate analogy, Bunge cites Jones v. The Flying Clipper, 116 F. Supp. 386 (S.D.N.Y. 1953); Spartus Corporation v. S/S YAFO, 590 F.2d 1310 (5th Cir. 1979); Searoad Shipping Company v. E.I. duPont de Nemours & Company, 361 F.2d 833 (5th Cir. 1966); General Electric Company International v. S.S. NANCY LYKES, 706 F.2d 80 (2nd Cir. 1983). However, these cases clearly explain their rationale for depriving the carrier of the benefit of the $500 per package limitation of liability provision in COGSA following an unreasonable deviation:

> ... when the carrier deviates and enters upon a different venture from that contemplated, he exposes the cargo to unanticipated and additional risks against which he can not protect himself.

The Flying Clipper, 116 F. Supp. at 389, quoting, The Chester Valley, 110 F.2d 592, 594 (5th Cir. 1940).

The Second Circuit has further explained this rule in stating that:

> [U]nreasonable deviations are 'fundamental breach[es] which go [ ] to the very essence of the undertaking' ... since they expose cargo to unanticipated and additional risks.... It follows that a deviation which unjustifiably exposes cargo to unanticipated risks is such a serious breach of the contract of carriage that the carrier must be deprived of the protection of the §4(5) liability limitation.

S.S. NANCY LYKES, 705 F.2d at p. 87, quoting, The Flying Clipper, 116 F. Supp. at p. 389.

To deprive the carrier of the defensive use of the one-year time limitation through an analogy to these cases depriving the carrier of the $500 per package limitation would be an incorrect interpretation and application of this precedent. The underlying analysis of the voiding of the $500 per package limitation in §4(5) of COGSA following an unreasonable deviation turns on the fact that voiding this section renders the carrier liable, in essence as an insurer, forcing him to compensate the cargo owner for his breach. It would be impossible to apply this same analysis with regard to the one-year time limitation provision

> since a statute of limitation provision does not address liability or equitable results, but rather protects all parties, and the societal interest in

> prompt resolution of disputes, from unwarranted delay in bringing suits.

Insurance Company of North America v. S/S OCEANIS, 690 F. Supp. at 1367.

In fact, in creating the rule voiding COGSA's $500 per package limitation following an unreasonable deviation, the court in The Flying Clipper itself recognized that the two situations were distinct such that making an analogy based on one for resolution of the other would be inappropriate. In refusing to rely on cases cited by the carrier declining to void the time limitation following a carrier's deviation, the court stated:

> I do not consider these [cases] determinative of the issue presented under §1304(5) of the Act or controlling precedent, particularly so, since as counsel pointed out, a time limitation clause raises other issues. Moreover, Judge Augustus N. Hand, writing for the Court of Appeals, in a reference to the one-year provision ... stated: 'Nothing resembling a deviation

> has been shown to deprive the carrier of the benefit of the limitation."[8]

The Flying Clipper, 116 F. Supp. at 390, quoting, Switzerland General Ins. Co. v. Navigazione Libera Triestina, S.A., 91 F.2d 960, 963 (2nd Cir. 1944).

Accordingly, Canadian Pacific (Bermuda) submits that the District Court was correct in refusing to follow the line of cases which rely on an analogy to those cases denying the carrier the $500 per package limitation of COGSA following an unreasonable deviation as precedent to deny the carrier the defensive use of the time limitation period following a deviation. The courts that specifically have rejected the use of those cases voiding the COGSA $500 per package limitation provision following an unreasonable deviation as precedent for depriving the carrier of the defensive use of COGSA's one-year time limitation provision following an unreasonable deviation are correct. ROBERT E. LEE, supra; Rohm & Haas, supra; S/S OCEANIS, supra; Styling Plastics, supra.

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[8] In an effort to taint its persuasive effect, Bunge boldly concludes that "the district court below as well as other courts" have misinterpreted the statement made by Judge Augustus N. Hand. However, Bunge cites no authority in support of its "interpretation" of the meaning behind Judge Hand's remarks and accordingly, Bunge's lone construction of its meaning must fail.

CONCLUSION

Bunge Edible Oils' Petition for Writ of Certiorari should be denied. The holding of the District Court, as affirmed by the Fifth Circuit, dismissing the claims of Bunge as time barred as per §3(6) of COGSA was correct.

Respectfully submitted,

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